IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JENNIFER BRADLEY, Plaintiff, vs. NCAA, *et al*., Defendants.	Civil Action No. 16-0346 (RBW)

DEFENDANT UNITED STATES OF AMERICA'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT PERTAINING TO AFFIRMATIVE DEFENSES

Defendant the United States of America ("United States"), by and through undersigned counsel, respectfully submits this memorandum in opposition to Plaintiff's motion for summary judgment pertaining to Defendants' affirmative defenses (ECF No. 86). For the reasons stated in this memorandum, the United Sates respectfully requests that the Court deny Plaintiff's motion on the following grounds:

1. On the United States' second affirmative defense – statute of limitations – the motion should be denied on the grounds that it is moot. The Court has already conclusively ruled in Plaintiff's favor on this issue. (*See* Mem. Op. (ECF No. 36) at 12-13).

2. On the United States' third affirmative defense – the borrowed servant doctrine – the motion should be denied because it is an unwarranted and procedurally defective motion for a Fed. R. Civ. P. 37(b)(2) discovery sanction in the guise of a motion for summary judgment.

3. On the United States' eighth affirmative defense – assumption of risk – the motion should be denied on the grounds that it is moot. In the interest of narrowing the issues in this

case, the United States hereby and irrevocably withdraws its affirmative defense of assumption of risk.

4. On the United States' sixth affirmative defense – contributory negligence – the motion should be denied because it is an unfounded, premature and procedurally defective motion for a "directed verdict" premised on the argument that the United States has failed to meet its "burden of proof" on the issue of contributory negligence during *discovery* – not trial.

SUMMARY OF PLAINTIFF'S ARGUMENTS

Plaintiff's present motion for summary judgment pertaining to Defendants' affirmative defenses (ECF No. 86) is properly characterized as a motion for *partial* summary judgment, as it does not purport to establish that Plaintiff is entitled to judgment as a matter of law on the ultimate issue of whether any or all of the Defendants in this action are liable to Plaintiff under any of the various counts asserted in Plaintiff's Amended Complaint (ECF No 1-4). *See* Fed. R. Civ. P. 56(a) (rule entitled "Motion for Summary Judgment or Partial Summary Judgment" and stating that "[a] party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought.")

Plaintiff's motion is premised on the following arguments:

In Point I, Plaintiff argues that "Defendants were under a duty to provide the facts and evidence that support the basis of an affirmative defense." (Pl.'s Mem. Mot. Summ. J. (ECF No. 86-2) at 2). In this point, Plaintiff argues that she served an interrogatory on all of the Defendants requiring them to "state in detail the specific facts which form the basis for each [affirmative] defense" relied upon by each Defendant, and to identify the witnesses and specific evidentiary exhibits that support Defendants' assertion of each affirmative defense. (*Id*. at 2-3.) In other words, Plaintiff demanded that each Defendant present their case-in-affirmative defense

to her during the course of discovery; not during summary judgment or at trial. Plaintiff now argues that because Defendants did not present their respective affirmative defense cases to her during discovery, the Court should now strike their affirmative defenses. (*Id*. at 4-5.) Plaintiff cites no procedural rule or legal authority to support this proposition.

With respect to the United States on this point, Plaintiff specifically requests that the Court strike the United States' second and third affirmative defenses as asserted in its Answer (ECF No. 45), which are statute of limitations and employee under the power and control of another, i.e., the borrowed servant doctrine defense. (Pl's Mem. Mot. Summ. J. (ECF No. 86-2) at 5; *see also* Answer (ECF No. 45) at 1.)

In Point II, Plaintiff argues that "Defendants have failed to present any evidence to establish Plaintiff assumed the risk of negligent healthcare." (ECF No. 86-2 at 5.) Plaintiff clarifies that this argument is directed to "[a]ny assertion that a defense verdict should be granted because Plaintiff assumed the risk of suffering a concussion while playing field hockey [which] is irrelevant to this matter and should be excluded and summary judgment should be granted against the defendants." (*Id*.) This argument is a straw man with respect to the United States because the United States' theory of the defense of this case is not premised on the notion that Plaintiff assumed the risk of negligent healthcare or that her participation in the contact sport of field hockey precluded her from receiving competent healthcare.

Although not specified in Plaintiff's motion, this argument is directed – with respect to the United States – to the United States' eighth affirmative defense (assumption of risk) as asserted in its Answer (ECF No. 45 at 2).

In Point III, Plaintiff argues that "Defendants have failed to carry their burden of proof in establishing a *prima facie* case of contributory negligence." (ECF No. 86-2 at 14). In this point,

Plaintiff attempts to restrict the Defendants to a single possible theory of contributory negligence based on Plaintiff's assertion that "Defendants…have only indicated that the conduct that was negligent of [Plaintiff] Ms. Bradley was in failing to inform her trainers and team physician from September 23, 2011 until October 2, 2011." (*Id*.) This is another straw man argument because Plaintiff's delay in seeking treatment from September 23rd to October 2nd is not the basis of the United States' theory of contributory negligence in this case (please see discussion *infra* Point II).

Furthermore, Plaintiff argues that she is entitled to summary judgment on this issue because Defendants have not carried "their burden of proof" – during discovery, not at trial – that Plaintiff was contributorily negligent in this matter. Plaintiff cites case law to support the proposition that a defendant has the burden of proving the affirmative defense of contributory negligence, but cites no authority to support the proposition that a defendant is required to prove contributory negligence *during discovery*, prior to trial.

With respect to the United States, this argument is directed to United States' sixth affirmative defense (contributory negligence) as asserted in its Answer (ECF No. 45 at 2).

LEGAL STANDARD

Summary judgment should be granted when the pleadings and evidence show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Allen v. Johnson*, 795 F.3d 34, 39 (D.C. Cir. 2015). A fact is "material" if its existence or nonexistence affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine dispute" exists when the non-movant produces sufficient evidence of a material fact so that a fact finder is required to resolve the parties' differing versions at trial. *Id.* at 249.

The party moving for summary judgment has "the burden of demonstrating the absence of a genuine dispute as to any material fact." *Johnson v. Perez*, 66 F. Supp. 3d 30, 35 (D.D.C. 2014) (citing *Celotex Corp.*, 477 U.S. at 323). Once the moving party satisfies this burden, the "non-moving party must designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* (citing *Celotex Corp.*, 477 U.S. at 324). While the Court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor, the "non-moving party must show more than '[t]he mere existence of a scintilla of evidence in support of' his or her position." *Id.* (quoting *Anderson*, 477 U.S. at 252). "Moreover, the non-moving party 'may not rest upon mere allegation or denials of his pleading but must present affirmative evidence showing a genuine issue for trial.'" *Id.* (quoting *Laningham v. United States Navy*, 813 F.2d 1236, 1241 (D.C. Cir. 1987)). Finally, the moving party may succeed on summary judgment by pointing to the absence of evidence proffered by the nonmoving party in its effort to defeat the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 575 (1986).

ARGUMENT

I. PLAINTIFF IS NOT ENTITLED TO A RULE 37 DISCOVERY SANCTION IN THE GUISE OF A RULE 56 SUMMARY JUDGMENT MOTION BECAUSE PLAINTIFF DID NOT MOVE TO COMPEL THE UNITED STATES TO PROVIDE A DIFFERENT ANSWER TO PLAINTIFF'S INTERROGATORY #18.

Plaintiff believes she is entitled to request that the Court strike the United States' second and third affirmative defenses, which are statute of limitations and the borrowed servant defense (*See* Answer (ECF No. 45) at 1), because the United States did not – to Plaintiff's satisfaction – answer Plaintiff's interrogatory to "state in detail the specific facts which form the basis for each [affirmative] defense" and to identify the witnesses and specific evidentiary exhibits that support

the United States' assertion of its affirmative defenses. (*See* Pl.'s Mem. Mot. Summ. J. (ECF No. 86-2) at 3, 4.) Simply stated, Plaintiff is wrong.

With respect to the United States' second affirmative defense, i.e., statute of limitations, the Court has already ruled in Plaintiff's favor on this issue. In the Court's April 12, 2017 memorandum opinion and order, the Court denied the United States' motion to dismiss on grounds of statute of limitations based on the Court's finding that Plaintiff timely filed her Federal Tort Claims Act ("FTCA") administrative claim under the doctrine of equitable tolling. (*See* Mem. Op. (ECF No. 36) at 12-13.) The court's ruling on this issue was conclusive (*id.*); it was not an interim order pending the completion of discovery, as in the case of the Court's ruling on the United States' borrowed servant doctrine defense (*id*. at 20 n.7). Therefore, respectfully, the Court should deny Plaintiff's motion for partial summary judgment and to strike the United States' second affirmative defense (statute of limitations) on the grounds that it is moot.

Turning to the issue of the United States' third affirmative defense, i.e., the borrowed servant doctrine defense, the Court very much left that issue alive and ripe for re-adjudication upon the completion of discovery. (*See id*. ("[t]he Court finds the Government's motion for summary judgment premature given that discovery has not yet occurred in this case. However, after the close of discovery and once the record is complete, the Government may of course renew its motion for summary judgment on the grounds that the borrowed servant doctrine shifts sole liability to the Higgins Practice.")) And indeed, on January 16, 2019, the United States filed its motion for summary judgment based on the borrowed servant doctrine defense and Plaintiff's contributory negligence. (*See* ECF No. 88.) The question presented in Point I of Plaintiff's motion, therefore, is whether the United States' response to Plaintiff's interrogatory should result in the Court grating Plaintiff's present motion to strike the United States' third affirmative

(borrowed servant doctrine), which would of course also result in denial of that portion of the United States' motion for summary judgment (ECF No. 88). Respectfully, the answer of course, is no.

Point I of Plaintiff's motion is premised on the proposition that because the United States did not answer Plaintiff's interrogatory to Plaintiff's satisfaction, the Court "should strike" the United States' third affirmative defense (borrowed servant doctrine). (*See* Pl.'s Mem. Mot. Summ. J. at 3-4). Plaintiff cites to no rule of procedure or legal authority in support of this request for such drastic and extraordinary relief. The reason, of course, is that Plaintiff's motion is not one for partial summary judgment under Rule 56, but is instead a motion for a discovery sanction under Rule 37. But, as explained below, Plaintiff has not satisfied the conditions precedent to seek the requested discovery sanction against the United States. Therefore, the Court should summarily deny this portion of Plaintiff's motion.

In Plaintiff's motion, Plaintiff provides the Court with the following text of the subject interrogatory, which was interrogatory #18 as asserted to the United States:

> With regard to each affirmative defense which you may rely upon, state in detail the specific facts which form the basis for each such defense; the name, address and telephone number of each witness who has knowledge of facts you intend to rely upon in support of each such defense; and a specific description of each exhibit which contains facts or may be relevant and tend to support and prove each such defense, including the name and address of the current custodian of each such exhibit.

(Pl.'s Mem. Mot. Summ. J. (ECF No. 86-2) at 3; *see also* Pl.'s Ex. 13 (USA's Objs. & Answers to Pl.'s Int's) (ECF No. 86-15) at 11.)

Plaintiff then states that the United States provided the following answer to this interrogatory:

> United States of America: Subject to the previously stated objections, the United States directs the Plaintiff to review the depositions taken, the United States' previous disclosures, along with the responses to other discovery requests in this case. The United States will comply with all scheduling orders issued by the Court.

(ECF No. 86-2 at 3; *see also* ECF No. 86-15 at 11-12.)

On the basis of the above-quoted response, Plaintiff argues that "[n]o supplementation was made" by the United States to its discovery response, and that "[g]iven all Defendants' failure to indicate in any way that another affirmative defense [other than assumption of risk and contributory negligence] is/was being pursued, the Court should strike" the United States' third affirmative defense, i.e., the borrowed servant doctrine defense. (ECF No. 86-2 at 4.)

However, Plaintiff failed to provide for this Court's consideration the United States *objection* to Plaintiff's interrogatory # 18, which appears right above the quoted answer provided by the United States. In its Objections and Answers to Plaintiff's Interrogatories, the United States asserted the following objection specifically to interrogatory #18:

> OBJECTION: *Defendant objects to the extent that information sought is protected by the attorney-client or work product privileges, including but not limited to documents or things prepared in anticipation of litigation*, *Hickman v. Taylor*, 329 U.S. 495 (1947); Fed. R. Civ. P. 26; *Fairbanks v. American Can Co*., 110 F.R.D. 685, 687 n.1 (D. Mass. 1986). Defendant also objects as the interrogatory is premature. This type of *contention interrogatory* is best resolved after some, or all, of the other discovery has been completed. *See* Fed. R. Civ. P. 33(a)(2) (court may determine a party need not respond to such an interrogatory until the completion of discovery); *Brassell v. Turner*, 2006 WL 1806465 at *3 (S.D. Miss. 1999) (discussing propriety of early contention interrogatories); *In re Convergent Technologies Securities Litigation*, 108 F.R.D. 328, 338 (N.D. Cal. 1985) (the interests of judicial economy and efficiency dictate that, "contention interrogatories are more appropriate after a substantial amount of discovery has been conducted"); *Brown v. United States*, 179 F.R.D. 101, 105 (W.D. N.Y. 1998) (same); *Nestle Foods Corp. v. Aetna Casualty*, 135 F.R.D. 101, 111 (D. N.J. 1990) (same). Finally, Federal Rule of Civil Procedure 8(b)(6) states an allegation is admitted if a responsive pleading is required and the allegation is not denied.

(ECF No. 86-15 at 11 (emphasis added)).

The above objection put Plaintiff on notice that the United States viewed interrogatory #18 as a premature "contention interrogatory," and worse, that it was an objectionable attempt to require the United States to disclose privileged information. Of course, Plaintiff and the United States will disagree over whether this objection was well-founded, but that is irrelevant at this point. What is relevant is that the United States' objection rightfully placed the burden on Plaintiff to make a decision – to either: (a) accept the United States' objection and proceed without the requested interrogatory answer; or (b) to consider the matter a discovery dispute that required the parties to "meet and confer" to resolve the issue, and if resolution was not achieved, then Plaintiff should have moved to compel the United States to answer the interrogatory.

In this case, Plaintiff decided on "option a." Plaintiff did not request a "meet and confer" and did not move to compel the United States to provide a more "satisfactory" answer to interrogatory #18. And under Rule 37, that was a condition precedent to Plaintiff now asking for the drastic and extraordinary discovery sanction that Plaintiff now in effect seeks in its "motion for summary judgment." *See* Fed. R. Civ. P. 37(a)-(b) (providing that a party may move for an order to compel an interrogatory response and that a motion for discovery sanctions may only be based on the non-responsive party's failure to comply with the court's order compelling the party to respond; such sanctions include "prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence" and "striking pleadings in whole or in part").

Because Plaintiff selected "option a" and effectively waived her opportunity to compel the United States to provide a "more satisfactory" (in Plaintiff's view) answer to interrogatory #18, Plaintiff may not now move this court for the drastic and extraordinary remedy of the requested discovery sanction in the guise of a "motion for summary judgment." In the absence

of an order compelling the United States to provide a different response to interrogatory # 18 and in the absence of the United States' failure to comply with such order, Plaintiff's motion is procedurally defective and should be summarily denied.

Finally and perhaps as an aside but one worth noting, Plaintiff cannot reasonably claim surprise or unfair prejudice by the United States re-asserting its borrowed servant doctrine defense in its recently filed motion for summary judgment. (*See* United States' Mot. Summ. J. (ECF No. 88)). In the Court's memorandum opinion denying the United States' motion to dismiss on grounds of the borrowed servant doctrine defense, the Court expressly and unequivocally stated that it "finds the Government's motion for summary judgment premature given that discovery has not yet occurred in this case. However, after the close of discovery and once the record is complete, the Government may of course renew its motion for summary judgment on the grounds that the borrowed servant doctrine shifts sole liability to the Higgins Practice." (Mem. Op. (ECF No. 36) at 20 n.7.) If during discovery Plaintiff failed to account for the inevitability that the United States would re-assert this defense in its motion for summary judgment, and if necessary, at trial, then that is Plaintiff's fault; not the United States.

For all of these reasons, Plaintiff's motion for discovery sanctions cloaked as a motion for summary judgment should be summarily denied.

II. IN THE INTEREST OF NARROWING THE ISSUES IN THIS CASE, THE UNITED STATES WITHDRAWS ITS EIGHTH AFFIRMATIVE DEFENSE: ASSUMPTION OF RISK.

In Point II, Plaintiff argues that "Defendants have failed to present any evidence to establish Plaintiff assumed the risk of negligent healthcare." (ECF No. 86-2 at 5.) Plaintiff then clarifies that this argument is directed to "[a]ny assertion that a defense verdict should be granted because Plaintiff assumed the risk of suffering a concussion while playing field hockey [which]

is irrelevant to this matter and should be excluded and summary judgment should be granted against the defendants." (*Id*.)

With respect to the United States, this is a straw man argument. The United States' defense of this case is not premised on the notion that Plaintiff assumed the risk of negligent healthcare or that her participation in the contact sport of field hockey precluded her from receiving competent healthcare. However, the United States acknowledges that it did assert assumption of risk as its eighth affirmative defense. (*See* USA's Answer (ECF No. 45) at 2). In the interest of narrowing the issues in this case, the United States hereby and irrevocably withdraws its eighth affirmative defense. On that basis, the United States respectfully requests that the Court deny Plaintiff's motion to strike the United States' eighth affirmative defense on the grounds that it is moot.

III. PLAINTIFF'S MOTION FOR A "DIRECTED VERDICT" ON THE ISSUE OF CONTRIBUTORY NEGLIGENCE SHOULD BE DENIED BECAUSE (1) BURDENS OF PROOF ARE SATISFIED OR NOT SATISIFED AT TRIAL – NOT DURING DISCOVERY; AND (2) PLAINTIFF DID NOT CORRECTLY CHARACTERIZE THE UNITED STATES' THEORY OF CONTRIBUTORY NEGLIGENCE IN THIS CASE.

In Plaintiff's Point III, Plaintiff argues that "Defendants have failed to carry their burden of proof in establishing a *prima facie* case of contributory negligence." (ECF No. 86-2 at 14). This argument is flawed for two reasons. First and first foremost, there has been no trial in this case yet. It is axiomatic that "burdens of proof" are satisfied or not satisfied at trial – not during discovery. Because there has been no trial in this case yet, the United States has not yet been required to prove any affirmative defense through the presentation of evidence and has not been required to meet any burden of proof; certainly not during discovery. Plaintiff's attempt to move for summary judgment on the grounds that the United States has failed to meet a "burden of

proof" during discovery is misplaced, lacks a basis in law or rule of procedure, and should be summarily rejected.

Second, Plaintiff's attempt to characterize and restrict the United States to her preferred defense theory of contributory negligence is a straw man argument and should also be rejected. Plaintiff attempts to restrict the United States to a single possible theory of contributory negligence based on Plaintiff's assertion that "Defendants…have only indicated that the conduct that was negligent of [Plaintiff] Ms. Bradley was in failing to inform her trainers and team physician from September 23, 2011 until October 2, 2011." (*Id*.) But that is not the United States' theory of contributory negligence in this case, and the United States has given Plaintiff no reason to believe that it is.

On the contrary, Plaintiff's interrogatory #3 asked the United States the following question: "Do you contend that Plaintiffs, in any way assumed the risk of any of her acts that you contend caused or *contributed* to the injury complained of? If so, please identify fully the basis thereof." (Pl.'s Ex. 13 (USA's Objs. & Answers to Pl.'s Int's) (ECF No. 86-15) at 5 (emphasis added)). After stating its objection to this interrogatory, the United States provided the following answer:

> ANSWER: Subject to, and without waiver of, the foregoing objections, plaintiff is directed to her Complaint, her administrative claim, defendant's initial disclosures, responses to plaintiff's other discovery requests, and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671, et seq. Plaintiff has stated that she voluntarily played a sport in which she was regularly hit in the head. She states that the incident which led to this litigation was no worse than other hits she had taken. Further, in her deposition she said it was her nature to play as much as she could and not complain. The Plaintiff further stated that "Division I athletes don't typically ask to be taken out of a game because they'll probably lose playing time for the rest of the season" and that she did not ask to be taken out of the Richmond game. Plaintiff also stated as a Division I athlete you keep playing regardless. Plaintiff acknowledges that she was playing a sport for which she was given a test to determine her concussion baseline. Following the Richmond game, Plaintiff was given multiple tests by the athletic trainer to help determine whether she had a

> concussion; *then when she saw a doctor regarding her injury, she did not tell the doctor that she sustained a direct or indirect blow to the head. Plaintiff provided to Dr. Williams an incomplete medical history.*

(*Id*. at 6 (emphasis added)).

The United States' theory of contributory negligence in this case – that Plaintiff contributed to Dr. Williams' alleged negligent diagnosis by not disclosing the contact to the head that she allegedly sustained during the Richmond field hockey game on September 23, 2011 – has been clearly noticed at least as far back as when the United States served its Objections and Answers to Plaintiff's Interrogatories on June 15, 2018. (*See id*. at 14.) And indeed, that is the second basis for the United States' present motion for summary judgment in this case filed on January 16, 2019 (*see* USA's Mem. Mot. Summ. J. (ECF No. 88-2) at 17-23) and the United States respectfully refers the Court to that motion to assess the merits of its theory of contributory negligence.

Furthermore, it apparently must be noted that in the United States' motion for summary judgment (ECF No. 88), the United States does not have a "burden of proof." The United States' only burden in that motion is to show that there are no genuine issues of material fact *requiring a trial* and that the United States is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a) (summary judgment standard). Therefore, Plaintiff's argument that she is entitled to, in effect, a "directed verdict" because the United States has not met its "burden of proof" during discovery to prove the Plaintiff was contributorily negligent because she failed to inform her trainers and team physician about the alleged contact until October 2, 2011, is misplaced, lacks argumentative merit, lacks a basis in law or a rule of procedure, and should be summarily rejected. Respectfully therefore, the Court should deny Plaintiff's request to strike the United States' sixth affirmative defense of contributory negligence.

CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court deny Plaintiff's motion for summary judgment pertaining to the United States' affirmative defenses.

Dated: February 1, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 1st day of February 2019, I served the foregoing memorandum in opposition to Plaintiff's motion for summary judgment pertaining to Defendant's affirmative defenses upon counsel for all parties in this case by filing said document using the Court's Electronic Case Filing System.

Dated: February 1, 2019

/s/ Roberto C. Martens, Jr.

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